A&A Equity Sdn Bhd v Transnational Insurance Brokers (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1–21–98 OF 2001
KANG HWEE GEE J
7 JUNE 2006

Civil Procedure — Writ of summons — Striking out — Immunity from any suit — Eighth defendant a statutory body — Whether exercising its regulatory power when issuing a directive — Whether immunity applies — Insurance Act 1996 59(2), Takaful Act 1984 s 47(1)

This is an appeal against the decision of the senior assistant registrar in dismissing the eighth defendant's ('D8') application to strike out plaintiff's pleading under O 18 r 19(1)(a), (b) and/or (d) of the Rules of the High Court 1980 under the court's inherent jurisdiction. The plaintiff is a company incorporated on 22 August 1995. A scheme was formulated by the plaintiff in 1993 to provide consultancy services with respect to workmen's compensation scheme for foreign workers ('Scheme'). The first defendant ('D1') is an insurance broker licensed under Insurance Act 1996 ('IA'). The plaintiff entered into a consultancy agreement dated 30 November 1995 with Dl to provide services so as to implement the scheme. The second to seventh defendants ('D2–D7') are underwriters licensed under the law to have been recruited to participate in the scheme. D8 is a statutory body under IA and Takaful Act 1984 ('TA') to regulate the insurance industry in this country. One year after plaintiff had implemented the scheme together with D2-D7, D8 issued a directive in a letter dated 24 June 1999 ('directive') to terminate the appointment of the plaintiff and D1. D8's grounds for striking out the plaintiff's pleading are that (i) there is no cause of action against D8 as D8 exercised its regulatory function under s 59(2) IA and s 47(1) TA 1984 and enjoys immunity from any suit; (ii) no legal standing on the plaintiff's part to institute this action as the scheme had existed before incorporation of the plaintiff; (iii) the plaintiff had earlier sued D1 only and obtained judgment against D1 after a full trial in the first suit. The plaintiff should have sued all the relevant parties in the first suit since the plaintiff had actual knowledge of the directive at the time of commencement of the first suit. The plaintiff contends that (i) D8 cannot claim immunity under s 191IA nor under s 55 TA as D8 had acted in bad faith in exercising its function to terminate the scheme; (ii) the plaintiff's cause of action in this case is based on a contract with D1 dated 30 November 1995. The plaintiff's cause of action as against D2 to D7 is based on D2 to D7's procurement of the breach of the plaintiff's contract with D1, hence there are different causes of action against Dl, D2 to D7 and D8. The first suit is only an action for the recovery of money, albeit after termination of the contract by D8.

Held, allowing the eighth defendant's appeal:

(1) D8 ought to be allowed to succeed on the ground that D8 is immune from being sued for any function that it performed bona fide under the respective provisions of IA and TA. There is a common law presumption that all its official acts including the act of giving directions to insurance companies as in the instant case, have been regularly performed (see para 10(a)(i)-(ii)).

(2) A party questioning the bona fide of D8's act must be able to provide cogent evidence apparent on the record that the act it performed was non bona fide. The mere fact that D8 had issued a directive to the other defendants to stop the scheme when it had not earlier replied negatively to D1 's enquiry with respect to the implementation of the scheme, does not on the face of it disclose any non bona fide on its part. Any evidence pointing to any such non bona fide act must be disclosed to oppose an application to strike out. It is not open to the plaintiff to try to discover from cross-examination of D8 at the trial that its act of directing D2 to D7 from continuing with the scheme was not bona fide. To find an action for any breach of statutory duty on the part of a statutory person, the breach must already exist when the action is filed. The plaintiff had failed to show by its affidavit that there was such a breach on the part of D8 (see para 10(a)(iii)-(iv)).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan penolong kanan pendaftar menolak permohonan defendan kelapan ('D8') membatalkan pliding plaintif di bawah A 18, k 19(1)(a), (b) dan/atau (d) Kaedah-kaedah Mahkamah Tinggi 1980 di bawah bidang kuasa sedia ada mahkamah. Plaintif ialah sebuah syarikat yang ditubuhkan pada 22 Ogos 1995. Satu skim dirumuskan oleh plaintif pada 1993 untuk membekalkan satu servis pakar runding berhubung dengan skim pampasan pekerja asing ('Skim tersebut'). Defendan pertama ('D1') adalah broker insurans yang dilesenkan di bawah Akta Insurans 1996 ('AI'). Plaintif memasuki satu perjanjian pakar perundingan bertarikh 30 November 1995 dengan D1 untuk membekalkan servis tersebut agar ia dapat melaksanakan skim tersebut. Defendan kedua sehingga defendan ketujuh ('D2-D7') adalah penaja jamin yang dilesenkan di bawah undang-undang yang telah direkrut untuk menyertai skim tersebut. D8 ialah sebuah pertubuhan berkanun di bawah AI dan Akta Takaful 1984 ('AT') yang mengawal industri insurans di negara ini. Setahun selepas plaintif melaksanakan skim bersama-sama D2-D7, D8 telah mengeluarkan satu arahan dalam suratnya yang bertarikh 24 Jun 1999 ('arahan tersebut') untuk menamatkan pelantikan plaintif dan D1. Alasan-alasan D8 untuk membatalkan pliding plaintif ialah bahawa i) tiada kausa tindakan terhadap D8 oleh kerana D8 menjalankan fungsi pengawalannya di bawah s 59(2) AI dan s 4(1) TA 1984 dan menikmati kekebalan daripada sebarang tindakan; (ii) plaintif tiada taraf di sisi undang-undang untuk melaksanakan tindakan ini oleh kerana skim tersebut wujud sebelum plaintif ditubuhkan; (iii) plaintif telah pada awalnya mendakwa D1 sahaja dan mendapatkan satu penghakiman terhadap D1 selepas perbicaraan penuh tindakan pertama tersebut. Plaintif sepatutnya mendakwa semua pihak yang relevan di tindakan pertama oleh kerana plaintif mempunyai pengetahuan sebenar arahan tersebut pada masa memulakan tindakan

pertama tersebut. Plaintif menyatakan bahawa (i) D8 tidak boleh menuntut kekebalan di bawah s 191 AI ataupun s 55 AT oleh kerana D8 telah bertindak dengan niat jahat dalam menjalankan fungsinya untuk menamatkan skim tersebut; (ii) kausa tindakan plaintif di dalam kes ini berdasarkan kontrak dengan D1 bertarikh 30 November 1995. Kausa tindakan plaintif terhadap D2 ke D7 berdasarkan pemerolehan D2 ke D7 mengingkari kontrak plaintif dengan D1, dengan itu terdapat kausa tindakan yang berbeza terhadap Dl, D2 hingga D7 dan D8. Tindakan pertama hanya satu tindakan untuk mendapatkan semula wang, walaupun selepas penamatan kontrak oleh D8.

Diputuskan, membenarkan rayuan defendan kelapan:

(1) Rayuan D8 patut dibenarkan atas alasan bahawa D8 kebal daripada disaman untuk sebarang fungsi yang dilaksanakannya secara bona fide di bawah peruntukan-peruntukan AI dan AT masing-masing. Terdapat tanggapan common law bahawa semua tindakan-tindakan rasminya termasuk tindakan memberi arahan kepada syarikat-syarikat insurans seperti dalam kes ini, telah dilaksanakan dengan teratur (lihat perenggan 10(a)(i)-(ii)).

(2) Pihak yang menyoal bona fide tindakan D8 mesti membekalkan bukti yang kukuh yang jelas di atas rekod bahawa tindakan yang dilaksanakannya adalah tidak bona fide. Fakta bahawa D8 telah mengeluarkan satu arahan kepada defendan-defendan yang lain untuk memberhentikan skim tersebut apabila ia pada mulanya tidak menjawab secara negatif kepada pertanyaan D1 berhubung dengan implementasi skim tersebut, tidak pada permukaannya mendedahkan sebarang ketiadaan bona fide di pihaknya. Sebarang bukti yang menunjukkan sebarang tindakan bona fide mesti didedahkan untuk membantah permohonan untuk membatalkan pliding tersebut. Ia tidak terbuka kepada plaintif untuk cuba menemui secara soal balas D8 pada perbicaraan bahawa tindakannya mengarah D2 ke D7 daripada meneruskan skim tersebut adalah tidak bona fide. Untuk membolehkan satu tindakan terhadap keingkaran kewajipan berkanun dipihak seseorang yang berkanun, keingkaran tersebut mesti telahpun wujud ketika tindakan itu difailkan. Plaintif telah gagal menunjukkan melalui afidavitnya bahawa terdapat keingkaran sebegini di pihak D8 (lihat perenggan 10(a)(iii)-(iv)).]

Notes

For cases on striking out, see *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 7133–7154.

Legislation referred to

Insurance Act 1996 ss 59(2),191
Rules of the High Court 1980 O 18 r 19(1) (a), (b), (d)
Takaful Act 1984 ss 47(1), 55

Prem Ramachandran (Kumar Partnership) for the plaintiff.
Wong Kian Kheong (Karen Lee with him) (Lee Hishammuddin Allen & Gledhill) for the eighth defendant.

Kang Hwee Gee J:

[1] This is an appeal against the decision of the senior assistant registrar in dismissing the eighth defendant's ('D8') application to strike out plaintiff's ('P') pleading under O 18 r 19(1) (a), (b) and/or (d) of the Rules of the High Court 1980 ('RHC') and/or under the court's inherent jurisdiction. P is a company incorporated on 22 August 1995.

[2] A scheme was formulated by P in 1993 to provide consultancy services with respect to workmen's compensation scheme for foreign workers ('scheme').

[3] The first defendant ('D1') is an insurance broker licensed under Insurance Act 1996 ('IA'). P entered into a consultancy agreement dated 30 November 1995 with D1 to provide services so as to implement the scheme.

[4] The second to seventh defendants ('D2–D7') are underwriters licensed under the IA who have been recruited to participate in the scheme.

[5] D8 is a statutory body under IA and Takaful Act 1984 ('TA') to regulate the insurance industry in this country.

[6] One year after P had implemented the Scheme together with D2–D7, D8 issued a directive in a letter dated 24 June 1999 ('Directive') to D1 as follows:

SULIT

Tuan Haji Ahmad Ghitti 24 Jun 1999

Ketua Pegawai Eksekutif

TRANSNATIONAL Insurance Brokers (M) Sdn Bhd

Suite 6.3, Tingkat 6

Jalan Semangat, Section 14

46100 PetalingJaya

Selangor

Tuan,

Skim Pampasan Pekerja Asing (SPPA)

Kami merujuk pada surat tuan bertarikh 17 Mei, 19 Mei dan 16 Jun 1999 berkenaan dengan perkara di atas.

2. Adalah dimaklumkan bahawa Bank Negara Malaysia (BNM) dengan persetujuan Menteri Kewangan I telah mengarahkan semua panel penanggung insurans yang terlibat dalam SPPA menamatkan pelantikan Inchcape Insurance Brokers Sdn. Bhd. atau Changkat Saujana Sdn. Bhd. sebagai 'Scheme Interface Manager (SIM)'.

3. Penamatan ini adalah perlu kerana pelantikan SIM boleh memudaratkan kepentingan penanggung-penanggung insurans berkenaan. Sehubungan dengan ini, isu mengenai syarikat tuan dilantik menjadi SIM dan lain-lain isu yang berkaitan tidak sepatutnya timbul lagi.

Sekian terima kasih

Yang benar,

…

(Datuk Zamani Abdul Ghani)

Penolong Gabenor'

In this action, D8 is being sued for issuing the directive.

[7] P's alleged cause of action against D8 is stated in paras 36–39 of the statement of claim ('SOC'):

36 The plaintiff contends that the direction by the eighth defendant to the sixth defendant to terminate the services of the plaintiff and the first defendant as the Scheme Interface Managers is ultra vires, invalid and consequently null and void for the following reasons:

(36) the plaintiff and the first defendant were appointed as the Joint Scheme Interface Managers by the HR Minster/Ministry. Consequently, the eighth defendant has no power in law and/or in fact to direct the sixth defendant to terminate the aforesaid appointment of the plaintiff and the first defendant. The purported direction by the eighth defendant is in complete lack of or excess of jurisdiction and is therefore ultra vires, invalid and null and void;

(36) since the-appointment was by the HR Ministry, the power to terminate the appointment is also vested in the HR Ministry and not in the eighth defendant;

(36) the eighth defendant was neither privy to nor a party;to the contract between the HR Ministry and the first defendants and/or the plaintiff and the contract between the plaintiff and the first defendant and the contract between the first defendant and the second to the seventh defendants;

(36) though approached by the plaintiff and the first defendant for its approval of the Scheme and their appointments thereunder, the eighth defendant had declined jurisdiction and by reasons thereof is now estopped in law and in fact from maintaining otherwise or asserting any purported jurisdiction to terminate the appointments, directly or indirectly, of the plaintiff and the first defendant as aforesaid; and

(36) by directing the second to the seventh defendants to terminate the appointment of the plaintiff and/or the first defendant as aforesaid, the eighth defendant has induced a breach of the contract between the second to seventh defendants and the plaintiff and/or the first defendant in respect of the scheme.

37 The plaintiff also contends that the eighth defendant had no jurisdiction to interfere with, override, object to or disapprove any of the terms and conditions or consideration of the appointment ofthe plaintiff and/or the first defendant as Joint Scheme Interface Managers and consequently, the eighth defendant had unlawfully interfered with the trade and/or business of the plaintiff.

38 The aforesaid conduct of the eighth defendant has been disapproved of by the HR Ministiy which has instructed that thee services of the plaintiff and the first defendant as Joint Scheme Interface Managers should in no way be discontinued. Despite the instruction of the HR Ministry, the eighth defendant has failed and/or refused to relent and/or withdraw the unlawful termination of the plaintiff and the first defendant as aforesaid.

39 In consequence of the matters aforesaid, the plaintiff has lost the benefit of the consultancy agreement and consequently lost the profit they would otherwise have made and they have been greatly injured in their said business and have been put to considerable trouble, inconvenience and expense and they have thereby suffered loss and damage.

[8] D8's grounds for striking out P's pleading are three-fold:

(a) no cause of action against D8 as D8 exercised its regulatory function under s 59(2) IA and s 47(1) TA 1984:

S 59(2) IA:

> The Bank, by order in writing, may do any act in relation to the licensed insurer, its business, director or employee or may require the licensed insurer to do or not to do any act in relation to itself, its business, director or employee.

S 47(1) TA 1984:

> 47. Powers of Director General to issue directions.
>
> (1) Where the Director General is satisfied that the affairs of an operator are being conducted in a manner likely to be detrimental to the public interest, the interests of the participants, or the interests of the operator, the Director General may issue such direction to the operator as he considers necessary and may in particular require the operator:
>
> (a) to take such action or engage such management personnel as may be necessary to enable the operator to conduct its business in accordance with sound takaful principles;
>
> (b) to remove any of its directors whom the Director General considers not a fit and proper person to remain a director;
>
> (c) to take action as to the disposal or recovery of its assets;
>
> (d) to take steps for the recovery by the operator of sums appearing to the Director General to have been illegally or improperly paid;
>
> (e) to cease renewal or cease issue of certificates of the classes of business to which the direction relates;
>
> (f) to make such arrangements with respect to re-takaful as the Director General specifies.

In exercising D8's functions under IA and TA, D8 enjoys immunity from any suit.

Section 191 IA:

> The Minister, the Governor, the Bank, its director, employee or any person acting on its behalf, shall not be liable to an action or other proceedings for damages for, or on account of, or in respect of, an act done or statement made, or omitted to be done or made, in the performance of a function under this Act if the act was done or statement was made, or omitted to be done or made, in good faith.

Section 55 TA:

> The Director General, any officer of the Central Bank appointed under subsection 54(5), any person appointed under subsection 46(3), or any person authorised or appointed under subsection 54(6) shall not be liable for anything done or omitted to be done in good faith in the exercise of any power or the performance of any function or duty conferred or imposed by this Act or any regulations made thereunder.

(b) no legal standing on P's part to institute this action as by para 10 SOC, the scheme had existed before incorporation of P - Refer to 'exh SAH-1' of D8's second affidavit affirmed on 26 January 2004 which clearly shows P was incorporated on 22 August 1995; and

(c) P had elected to sue only D1, P had earlier sued D1 only before James Foong J (as his Lordship then was) ('first suit'). P then obtained judgment against D1 after a full trial ini the first suit. P should have sued all the relevant parties in the first suit since P had actual knowledge of the directive at the time of commencement of the first suit.

[9] D8's application was opposed by P on the following grounds:

(a) First-fold — D8 cannot claim immunity under s 191 IA nor under s 55 TA as D8 had acted in bad faith in exercising its function to terminate Scheme. This is borne out by the fact that before embarking on the Scheme, D2 to D7 had earlier sought clearance from D8 to implement the Scheme and D8 had replied by way of a letter dated 29 July 1998 to refer to the Human Resource Ministry. D8's letter reads as follows:

> Kami berpendapat pelantikan 'Scheme Interface Manager' (SIM) lebih wajar dibuat oleh Kementerian Sumber Manusia (KSM) memandangkan SIM lebih membantu KSM dalam melaksana dan menyelaraskan SPPA. Kami juga menggangap kadar 15% fee yang dibayar kepada SIM daripada premium kasar adalah tinggi dan perlu dipertimbangkan semula;

; and

(b) Second-fold — P's cause of action in this case is based on a contract with D1 dated 30 November 1995. P's cause of action as against D2 to D7 is based on D2 to D7's procurement of the breach of P's contract with D1. Paragraphs 30 to 31 SOC read as follows:

> 30 By letter dated 24 June 1999, the eighth defendant informed the first defendant that they had directed the various insurance companies, including the 2nd to the 7th Defendants to terminate the appointment of the first defendant as the Scheme Interface Manager.
>
> 31 Relying thereon and induced thereby, the 2nd to 7th Defendants wrongfully and lawfully withheld the payment of the Management Fees payable to the first defendant and consequently, the first defendant withheld the payment of the portion of the Management Fees payable to the first defendant to the plaintiff under the Consultancy Agreement.

[10] Having heard the submission of the parties, my finding is as follows:

(a) The main ground:

(i) D8 ought to be allowed to succeed on the ground that D8 is immune from being sued for any function that it performed bona fide under the respective provisions of IA and TA.

(ii) D8, it must be appreciated at once is an official body with a statutory function to perform. There is a common law presumption that all its official acts including the act of giving directions to insurance companies as in the instant case, have been regularly performed.

(iii) A party questioning the bona fide of D8's act must be able to provide cogent evidence apparent on the record that the act it performed was non bona fide. The mere fact that D8 had issued a directive to the other defendants to stop the Scheme when it had not earlier replied negatively to D1's enquiry with respect to the implementation of the Scheme, does not on the face of it disclose any non bona fide on its part.

(iv) Any evidence pointing to any such non bona fide act must be disclosed to oppose an application to strike out. It is not open to P to try to discover from cross-examination of D8 at the trial that its act of directing D2 to D7 from continuing with the Scheme was not bona fide. To find an action for any breach of statutory duty on the part of a statutory person, the breach must already exist when the action is filed. P had failed to show by its affidavit that there was such a breach on the part of D8.

(v) The reply of D8 referred to was non committal with respect to its function and did not address the issue of whether or not the D8 has condescended to what P and other defendants were working on. Neither did it address the legality of the Scheme. It merely directed P or its agent rightly or wrongly to seek its answer from the Ministry of Labour. It did not also address the issue whether D8 would approve the Scheme. The reply showed; that the D8 had not applied its mind on whether it would exercise its power to stop the Scheme if it deemed necessary in the future and could not by any stretch of imagination be co-related to D8's subsequent letter forbidding the Scheme.

(vi) It is clear that there is no reasonable cause of action to sustain P's pleading. D8's appeal must be allowed with costs.

(b) The other two grounds:

(i) Having made a ruling on D8' s best foot forward, the other two grounds now become academic.

(ii) It is clear that there is no merit on the complaint that the Scheme was hatched even before P's birth. It's clear that what P is alleging is a breach of agreement which it had entered into with D1 after its incorporation although the idea to start the Scheme had manifested before; its incorporation. The pleading may be imperfect at this stage. But an imperfect pleading can be perfected in the course of the trial by amendment and should not be a cause for striking out.

(iii) The same goes for the argument that P had elected to sue only D8 when it decided to sue only D1 in the First Suit. The doctrine of election as it applies to commencement of litigation can be summarized as follows:

> If a party has at his disposal all the remedies that it could possibly pursue in that-same action but chooses not to pursue all of them, he cannot now commence a new action to claim based on causes of action that he has missed out in the earlier action.

(iv) The doctrine of election would not apply to D8 as D8 was not a party in the previous action. P was not obliged at the stage P commenced action against D1 to consider suing D8 in the same action. I would therefore accept P's argument that P's action in the previous action was restricted to only claiming a debt from D1.

Eighth defendant's appeal allowed.

Reported by Sally Kee